FILED

99548 SEP 27 1999

OFFICE OF THE CLERK

No. 99-____

IN THE

Supreme Court of the United States

In Re: THE LESLIE FAY COMPANIES, INC.,

Debtors.

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

Petitioners,

—v.—

THE LESLIE FAY COMPANIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Petitioners

5188

QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit's Summary Order deprive petitioners of appropriate appellate consideration of the issues presented for review?

2. Were petitioners' jury trial and Article III constitutional rights violated regarding their age, sex and disability discrimination claims as a result of the decisions below?

3. Should the reference of such claims to the Bankruptcy Court have been withdrawn?

4. Should disgorgement be required of all or part of the allowances for fees and expenses totaling over $13 million approved by the Bankruptcy Court to be paid to the attorneys for Leslie Fay?

5. Should those attorneys be disqualified and the decisions below vacated because of their conflicting interests?

LIST OF PARTIES TO PROCEEDINGS BELOW

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD, and RAYMOND J. TERWILLIGER,

Petitioners,

—v.—

THE LESLIE FAY COMPANIES, INC.,

Respondent.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
I. AN IMPORTANT ISSUE IS PRESENTED THAT WARRANTS RESOLUTION	7
II. APPLICATION OF 28 U.S.C § 157(d) TO DISCRIMINATION CASES RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION	14
III. DISQUALIFICATION AND DISGORGEMENT SHOULD HAVE MERITED INTENSIVE REVIEW	17
CONCLUSION	22

TABLE OF AUTHORITIES

Cases PAGE

Falbaum and *Kishbaugh*, 891 F.Supp. 986 (S.D.N.Y.) . 5, 8

Germain v. Connecticut Nat'l Bank, 988 F.2d 1323..8, 9, 11

In re Arlan's Dep't Stores Inc., 615 F.2d 925 (2d Cir. 1979) 19

In re Bennett Paper Corp., 63 B.R. 8 (E.D.Mo. 1985) . 10

In re Boyer, 93 B.R. 313, (N.D.N.Y. 1988)..... 16

In re Cache, Inc., 71 B.R. 851 (Bankr. S.D.Fla. 1987) . 10

In re Crivello, 194 B.R. 463 (Bankr. E.D.Wis. 1996) . 20

In re Envirodyne Inds. Inc., 150 B.R. 1008 (Bankr. N.D.Ill. 1993) 22

In re Federated Dep't Stores, Inc., 44 F.3d 1310 (6th Cir. 1995) 21

In re Futuronics, 655 F.2d 463 (2d Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) 19

In re Grabill Corp., 98 F.3d 773 (7th Cir. 1993).....21-22

In re Granite Sheet Metal Works, Inc., 159 B.R. 840 (Bankr. S.D.Ill. 1993).....17, 19

In re H.L. Stratton, Inc., 51 F.2d 984 (2d Cir. 1931), *cert. denied*, 284 U.S. 682 (1998) 19

In re Hansen, 164 B.R. 482 (D.N.J. 1994)..... 14

In re Hughes-Bechtol, Inc., 141 B.R. 946 (Bankr. S.D.Ohio 1993)..... 10

In re Ionosphere Clubs, Inc., 922 F.2d 984 (2d Cir. 1990) 10

PAGE

In re Leslie Fay Cos. Inc., 175 B.R. 525 (S.D.N.Y. 1994) 4, 18

In re the Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274 (S.D.N.Y. 1995) 4

In re Nat'l Distrib. Warehouse Co., 148 B.R. 558 (Bankr. E.D.Ark. 1992) 17

In re Nibisco Supply, Inc., Nos. 96-CV-0741E, 96-CV-0742E, 1997 U.S.Dist. LEXIS 7953 (W.D.N.Y. 1997) 13

In re Patterson, 150 B.R. 367 (E.D.Va. 1993) 14

In re Rusty Jones, Inc., 134 B.R. 321 (Bankr. N.D.Ill. 1991) 19-20

In re Tinley Plaza Assocs., L.P., 175 B.R. 272 (Bankr. S.D.N.Y. 1994) 17

In re Vicars Ins. Agency, 96 F.3d 949 (7th Cir. 1996) . 14

In re Weinberg, 153 B.R. 286 (Bankr.D.S.D. 1993) ... 10

In re White Motor Car Corp., 42 B.R. 693 (Bankr.N.D. Ohio 1984) 9-10

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) ... 9, 19

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 9, 14, 15

Oubre v. Entergy Operations, Inc., 522 U.S. 422, 118 S.Ct. 838 (1998) 16

Pepper v. Litton, 308 U.S. 295 (1939) 18

Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993) 12-13

Wittes v. Interco Inc., 137 B.R. 328 (E.D.Mo. 1985) .. 10

PAGE

Constitutional and Statutory Provisions Involved

U.S. CONST. Art. III 1, 5, 11, 14, 15

U.S. CONST. Art. III. § 1 8

U. S. CONST. Amend. VII 1, 9

U.S. Bankr. Code

11 U.S.C. § 101(14) 20

11 U.S.C. § 327 ..... 3, 20

11 U.S.C. § 327(a) 18, 19

11 U.S.C. § 362(a)(1) 12

11 U.S.C. § 362(a)(6) 12

11 U.S.C. § 362(h) 12

Federal Judgeship Act of 1984 (Pub. L. No. 98-353).. 14

28 U.S.C. § 157 ..... 2, 4, 14

28 U.S.C. § 157 (b)(5) 14, 16

28 U.S.C. § 157(d) 13, 14-15, 16

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1334(c)(1) 2

Older Workers Benefit Protection Act, ("OWBPA)

29 U.S.C. § 621 ..... 2, 16

29 U.S.C. § 626(f)(1) 16

Age Discrimination in Employment Act ("ADEA")

29 U.S.C. §§ 621 *et seq* 2, 10, 11

PAGE

29 U.S.C. § 626(c) 15

29 U.S.C. § 626(c)(2) 11

American with Disabilities Act of 1990, ("ADA")

42 U.S.C. §§ 12101 *et seq.* 2

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) 2

New York City Human Rights Law 5

Other Authorities

Bankr.P.R. 2014 ..... 17, 18, 20

Bankr.P.R. 2014(a) 17, 19

Bankr.P.R. 3003(c)(2) 12

Bankr.P.R. 3003(c)(3) 12

3 *Collier on Bankruptcy*, (15th ed.) ¶ 362.11[2] 12

9 *Collier on Bankruptcy*, (15th ed.) ¶ 3003.03 12

130 Cong. Rec. H1850, daily ed., March 21, 1984 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

No. 99-____

In Re: THE LESLIE FAY COMPANIES, INC.,

Debtors.

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

Petitioners,

—v.—

THE LESLIE FAY COMPANIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud, and Raymond J. Terwilliger, claimants-appellants in the proceedings below, respectfully petition this Honorable Court for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit dated June 29, 1999.

OPINIONS BELOW

The non-publishable Summary Order of the United States Court of Appeals for the Second Circuit affirming the District Court is in the Appendix at 2a.[1]

The District Court's decision affirming the Bankruptcy Court is in the Appendix at 5a.

The Bankruptcy Court's decision expunging the discrimination claims of petitioners is in the Appendix at 21a and 24a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on June 29, 1999. (2a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and the Seventh Amendment of the United States Constitution, Right to Trial by Jury, are involved in this case. (A1)

Statutory provisions include the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), Older Workers Benefit Protection Act (1990), 29 U.S.C. §§ 621 ("OWBPA"), Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), and the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, *et seq.*, as well as 28 U.S.C. § 157 of the Federal Judgeship Act of 1984 (Pub. L. No. 98-353), 28 U.S.C. § 1334(c)(1), Bankruptcy Rule 2014,

---

[1] The Appendix is filed as a separate document, and citations to it are followed by the suffix "a." Citations with the prefix "A" refer to the Addendum annexed hereto containing statutory and constitutional provisions. Citations with the prefix "J.A." refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

and 11 U.S.C. § 327 of the Bankruptcy Code. The foregoing provisions are in the Addendum annexed hereto. (A2, A5, A8, A10, A11, A12)

STATEMENT OF THE CASE

Petitioners are former employees of The Leslie Fay Companies, Inc. ("Leslie Fay") who have claims for age, sex and disability discrimination resulting from their termination from employment. Most of the petitioners (except for Mr. Kishbaugh) were terminated in 1992. On April 5, 1993, Leslie Fay was forced to file a petition under Chapter 11 of the Bankruptcy Code. (26a) The Chapter 11 filing occurred on the heels of a scandal implicating the management of Leslie Fay in self-dealing and accounting fraud. (169a-171a)

The accounting fraud resulted in converting Leslie Fay's losses into sham profits as a result of which the top managers and their allies on the Board of Directors enriched themselves for several years with incentive compensation bonuses and lucrative stock transactions.

After the whistle was unexpectedly blown by a controller of Leslie Fay (169a), those in the top management of Leslie Fay who were the principal beneficiaries of the accounting fraud contended that they did not know what was going on under their noses. They retained a law firm with continuing relationships with Leslie Fay investors and directors who also were beneficiaries of the accounting fraud, Weil, Gotshal & Manges (174a-177a), to throw Leslie Fay into the embrace of the Bankruptcy Court under whose auspices the Company was operated for four more years under the control of the same management under whose watch the accounting fraud and their self-enrichment had occurred. (169a-172a, 183a-192a)When it emerged "reorganized" from Chapter 11 in 1997, Leslie Fay's management was still dominated by the same C.E.O.

Despite the fact that the United States Trustee took the position that the law firm under whose orchestration the reorganization proceeding was played out in the Bankruptcy Court should be disqualified for multiple conflicts of interest (177a-179a), the Bankruptcy Court declined to do so. (192a) The Bankruptcy Court nevertheless found that undisclosed and improperly conflicting interests existed and that the bankruptcy proceeding was "unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and creditors." *In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 533 (S.D.N.Y. 1994). (183a)

Meanwhile, the identity of all of the participants in the accounting fraud still remains at issue. Paul Polishan, the former chief financial officer of Leslie Fay, is scheduled to go to trial under an indictment in the United States District Court in Scranton, Pa., in October 1999. The Securities and Exchange Commission still has not issued a report following its extended investigation. See *In re the Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274 (S.D.N.Y. 1995).

Petitioners asserted repeatedly, and in a timely manner, both in the Bankruptcy Court and in the District Court, that withdrawal of the reference of their discrimination claims from the Bankruptcy Court to the District Court was required under 28 U.S.C. § 157 on the basis that such claims involved federal employment discrimination statutes enacted under the power of Congress to regulate activities affecting interstate commerce.

On appeal, the District Court also ruled that there were no reversible errors in the non-jury trial conducted in the Bankruptcy Court with respect to appellants' discrimination claims. (15a)

In addition, the District Court rejected petitioners' request for disgorgement of fees and expenses exceeding $13 million paid to Leslie Fay's attorneys because of (a) the conflicting interests of those law firms in concurrently representing the

interests of the former officers and directors of Leslie Fay and (b) the inadequacies of the disclosures to the Bankruptcy Court by the attorneys involved. (9a)

In subsequent proceedings, the Bankruptcy Court denied the claims of petitioners for age, sex and disability discrimination, despite their contention that the Bankruptcy Court was without jurisdiction to do so, and that the petitioners' jury trial rights and those under Article III of the Constitution had been violated. (31a)

On appeal, the United States Court of Appeals for the Second Circuit issued a non-publishable "Summary Order" that avoided a full scale review of the issues that had been presented. (2a)

Related discrimination cases entitled *Jacob V. Falbaum, Anthony E. Gill, Emile Lewkowiez, and Raymond J. Terwilliger v. John J. Pomerantz, Alan Golub, Laura H. Pomerantz, Herman Gordon, and B. Michael Thrope*, 94 Civ. 5503(MGC) ("*Falbaum*"), and *Lee L. Kishbaugh v. John J. Pomerantz, Alan Golub, Laura H. Pomerantz, Herman Gordon, and B. Michael Thrope*, 94 Civ. 7921 (MGC) ("*Kishbaugh*"), asserting claims against individual defendants but not Leslie Fay were filed on July 24, 1994, and October 27, 1994, respectively. (J.A. 481-528; 657-74)

On July 24, 1995, the District Court ruled that appellants' claims against the individuals who had been officers of Leslie Fay could be maintained under the New York City Human Rights Law, but that petitioners' federal and state law discrimination claims could be maintained only against the employer, not the individuals who had been its officers. (152a) *Falbaum* and *Kishbaugh*, 891 F. Supp. 986 (S.D.N.Y. 1995).

The discriminatory mentality prevailing at Leslie Fay (J.A. 2903-06) was indicated by the testimony that Laura Pomerantz, on more than one occasion had stated in management

meetings that she wanted things to change, *wanted new faces, and 'young blood'* in the company." (J.A. 2903-06, 3122; emphasis added.)

Petitioner Raymond J. Terwilliger, formerly Leslie Fay's Vice President of Human Resources, testified that Paul Polishan had put together "hit lists" of older senior management targeted for termination" to carry out Laura Pomerantz's ageist directives. (J.A. 3122; 38a)

As stated above, Paul Polishan, the former Chief Financial Officer is presently under an indictment for criminal conspiracy involving accounting fraud with an imminent trial in the United States District Court for the Middle District of Pennsylvania. (J.A. 2213-63)

The indictment charges that Polishan directed the manipulation of the books and records kept by Leslie Fay in order to inflate the price of its stock and earnings, thereby currying favor with his superiors at Leslie Fay (J.A. 2229 ¶ 36), and leading to the overstatement of Leslie Fay's pre-tax income by in excess of $75,000,000 in the two and a half year period shortly before the company was forced to file a Chapter 11 petition. (J.A. 2222-26)

Terwilliger also identified Polishan as extensively involved in discriminatory conduct violative of the rights of the employees. (J.A. 2907-08)

The fraudulent manipulation of the Reduction in Force list by Polishan and his cohorts, at the insistence of Laura Pomerantz in her continuing quest for "new faces, and "young blood' " (J.A. 3122), as Terwilliger testified, is indicative of the same pattern or practice of fraudulent conduct by Leslie Fay that has resulted in Polishan's indictment for manipulation of financial records. (J.A. 2229)

The mendacity of Leslie Fay's management involving its Human Resources practices was made clear in its deliberate violation of the overtime pay requirements of the Fair Labor

Standards Act was admitted by Mr. Vallecorse, another former Vice President of Human Resources (J.A. 5920-21), and also in its the deliberate violation of the liquidated damage provisions of the collective bargaining agreement. (J.A. 5926)

> "I was always amazed that the company would make an agreement with the union and not think twice about violating it, and I brought that to the attention of a number of people that I found it—I found it unusual that you would make an agreement and not try to live by it, and that comment that you mentioned, Don't worry about it, it's not a big deal was—was told to me."

Roger Vallecorse, the former Human Resources Vice President, who was not a party in the litigation, characterized Leslie Fay's management as a "den of vipers" (J.A. 5929-31):

> "Q. Did you ever refer to the management of Leslie Fay as being a den of vipers?
>
> "A. I viewed it as a very difficult place to work, and I referred to them as viper-like, yes."
>
> * * * * *
>
> "A. . . . yes, I used that term."

REASONS FOR GRANTING THE PETITION

I. AN IMPORTANT ISSUE IS PRESENTED THAT WARRANTS RESOLUTION

In light of the important constitutional and statutory questions presented by the appeal to the Second Circuit, including those of first impression, it is submitted that the cursory Summary Order written by a "Deputy Clerk" for its "Acting Clerk" does not present an appropriate discharge of petitioners' rights to appellate review. (4a)

Whether judges have appropriately performed the function that they been appointed to perform by the President, by and with the consent of the Senate, or instead have subdelegated their responsibilities to clerks lacking such credentials is manifestly an important issue since it is only judges who are vested with "the judicial power" that is conferred under Article III, Section 1 of the Constitution. (A1)

On the basis of a quotation taken out of context from *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323 (2d Cir. 1993), the Second Circuit's Summary Order concludes that the Bankruptcy Court had jurisdiction to adjudicate petitioners' discrimination claims without a jury "Because the creditors in this case filed proofs of claims with the bankruptcy court seeking direct allowances against the debtor's estate." (3a).

Ignored was the fact that the lawsuit involved in *Germain*, by a bankruptcy *trustee*, and was not remotely like the employment discrimination claims brought by former employees here involved. As a matter of law the petitioners had no choice but to file proofs of claims with the bankruptcy court in order to avoid forfeiting them since (1) under the applicable federal discrimination statutes, such claims may be asserted only against an "employer," see *Jacob V. Falbaum et al. v. John J. Pomerantz et al.*, 891 F. Supp. 986 (S.D.N.Y. 1995), and (2) their former "employer" had taken matters out of their hands by itself had petitioning the Bankruptcy Court for "protection" from the consequences of the accounting fraud for which Leslie Fay's top officers and directors were responsible.

The former employees would have been left without a remedy against their former employer unless they proceeded to file their proofs of claims in the Bankruptcy Court promptly after receiving a "right to sue" letter from the Equal Employment Opportunity Commission with regard to the discrimination charges required to be filed with it.

This situation was not involved in the *Germain* case relied upon by the Second Circuit's Summary Order. *Germain* also differs in that it involved post-petition claims (988 F.2d at 1325), whereas five of the six claims involved in this litigation were the outgrowth of pre-petition claims.

The Second Circuit's Summary Order also overlooks the applicability of this Court's very pointed statement in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 545-46 (1990), which also involved a claim of employment discrimination:

> "Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights. The relitigation of factual issues before a jury is no more "needless" in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal, see *e.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), or that resolution of an equitable claim can precede resolution of a legal claim, see, *e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial."

The issues presented by this petition are of first impression. Since they involve the interaction of federal discrimination laws in which the right to jury trial is guaranteed by statute, as well as the Seventh Amendment, and the procedures of bankruptcy courts, which are Article I courts in which such jury trials cannot be constitutionally conducted, see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), makes highly desirable the resolution of such issues on a nation-wide basis in order to harmonize the conflicting decisions that exist on the subject. See *In re White*

Motor Car Corp., 42 B.R. 693 (N.D. Ohio 1984); *In re Hughes-Bechtol, Inc.*, 141 B.R. 946 (Bankr. S.D. Ohio 1992); *In re Weinberg*, 153 B.R. 286 (Bankr. D.S.D. 1993).

Apart from the District Court below, the only lower court decision declining to withdraw the reference to the Bankruptcy Court in such a case appears to be *Wittes v. Interco Inc.*, 137 B.R. 328, 329 n.1 (E.D. Mo. 1992), which acknowledged that it was refusing to follow the contrary decisions of *In re Bennett Paper Corp.*, 63 B.R. 8 (Bankr. E.D. Mo. 1985), and *In re Cache, Inc.*, 71 B.R. 851 (Bankr. S.D. Fla. 1987).[2]

Bennett Paper, supra, states that "While under 28 U.S.C. § 157 (b)(2)(B) the allowance or disallowance of a claim is a core proceeding which this Court may hear and determine, that section must be read with 28 U.S.C. § 157(d)," and then concluded that "Given that ADEA is a law of the United States regulating organizations or activities affecting interstate commerce and the Debtor admits that it is an organization within the purview of ADEA, it follows that [a motion by the EEOC to withdraw the reference] would have to be granted." 63 B.R. at 12.

Insofar as we are able to decipher the obscurity of the Summary Order below, it appears to be premised on the view that, because the jurisdiction of the Bankruptcy Court is equitable in nature, there was no right to a jury trial of the discrimination claims. (3a)

The fallacy in such a view, however, is shown by the statutory language of the ADEA itself, under which it is made clear that Congress specifically intended for the right to a

---

[2] The decision in *Wittes* is not applicable for the further reason that the papers before the court did not indicate that a demand for a jury trial had been made, *Wittes*, 137 B.R. at 329 n.2. and a district court decision (137 B.R. at 329), was relied upon that was subsequently reversed in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990).

trial by jury nevertheless to be available in the litigation of such a claim.

The ADEA provides that such claims are to be litigated in Article III constitutional courts ("a court of competent jurisdiction"), rather than bankruptcy courts, and that "a person *shall be entitled to a trial by jury* of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, *regardless of whether equitable relief is sought by any party in such action.*" 29 U.S.C. § 626(c)(2) (emphasis added).

The premise that petitioners waived their jury trial rights by filing proofs of claims in the Bankruptcy Court (3a) also is refuted by *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), which states, "We conclude that neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed." 988 F.2d at 1330.

After Leslie Fay filed its Chapter 11 petition, as a consequence of "calamitous" consequences of the accounting fraud perpetrated by member of its management (170a), petitioners had no choice but to follow suit and file their proofs of claims in the Bankruptcy Court when they did, in light of the bar date imposed by the Bankruptcy Court's Order, in order to assert their discrimination claims against their former employer. It follows that, in doing what was done in order to protect the survival of their claims in the only way possible, neither the petitioners nor their lawyer waived their jury trial rights. (SSA 1-3)[3]

The filing of the proofs of claim by petitioners was not a "voluntary" action for two reasons. First, because all claims against Leslie Fay other than those filed in the Bankruptcy Court were subject to an automatic stay under the Bankruptcy

---

[3] Citations preceded by the prefix "SSA" refer to the Second Supplemental Appendix filed with the United States Court of Appeals for the Second Circuit.

Code, they could not be separately litigated against petitioners' former employer. (11 U.S.C. § 362(a)(1), (6).) Violation of the automatic stay by the commencement of separate judicial proceedings therefore would have exposed petitioners to damages for contempt under 11 U.S.C. § 362(h). *See* 3 *Collier on Bankruptcy* (15th ed.) ¶362.11[2].

Second, because the Bankruptcy Court had imposed what is known as a "bar date" or "bar order" as an outgrowth of Leslie Fay's voluntary action of filing a Chapter 11 petition for reorganization. (SSA 1-3) Under Bankruptcy Procedure Rule 3003(c)(3), the Bankruptcy Court is required to "*fix . . . the time within which proofs of claim or interest may be filed.*" (Emphasis added.)

The bar date involved in this case provided (SSA 2):

> ". . . IF YOU ARE REQUIRED TO FILE A PROOF OF CLAIM AND FAIL TO DO SO IN THE MANNER PRESCRIBED ABOVE, YOU WILL BE FOREVER BARRED FROM VOTING UPON, OR RECEIVING A DISTRIBUTION UNDER, ANY PLAN OR PLANS OF REORGANIZATION FOR ANY OF THE DEBTORS *AND WILL BE FOREVER BARRED FROM ASSERTING ANY SUCH CLAIM AGAINST ANY OF THE DEBTORS OR THEIR SUCCESSORS OR ASSIGNS . . . .*" (Emphasis added.)

Petitioners' filing of such proofs of claims against Leslie Fay, their former employer, therefore, was a necessity, not a voluntary or optional act. This is made clear in Rule 3003(c)(2) of the Rules of Bankruptcy Procedure which requires a creditor to "file a proof of claim or interest within the time prescribed by subdivision (c)(3) . . . ."

If petitioners had *not* filed their proofs of claim, waiver of their claims would have occurred. 9 *Collier on Bankruptcy* (15th ed.) ¶3003.03. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993)

(discussing the effect of such a bar date, and risk of non-compliance). Thus the filing of a proof of claim is mandated to *avoid* a waiver. Such action therefore should not be construed as having been intended to result in the very thing it sought to avoid, *i.e.*, a waiver of rights.

The filing of a proof of claim is not a waiver of jury trial rights for the further reason that such action is presumptively done with knowledge of the existence of the right of withdrawal granted by 28 U.S.C. § 157(d). In other words, there would be nothing to withdraw unless the debtor had triggered the request by giving notice that it intended to contest the proof of claim that had already been filed. As stated in *In re Nibsco Supply, Inc.*, Nos. 96-CV-0741E, 96-CV-0742E, 1997 U.S. Dist. LEXIS 7953, at ** 4-6 (W.D.N.Y. 1997):

> "The statutory language requires, as a threshold matter, that there be a proceeding—a contested matter between a debtor and a creditor—in the bankruptcy court to be withdrawn. *In re E & S Facilities, Inc.*, 181 B.R. 369, 371 (S.D.Ind. 1995), affd. sub nom., *Matter of Vicars Ins. Agency Inc.*, 96 F.3d 949 (7th Cir. 1996).
>
> * * * * *
>
> "In this case AGCO has not yet filed a proof of claim
>
> . . . and has instead elected to attempt to avoid subjecting itself to the bankruptcy court's equitable jurisdiction and thereby preserve any Seventh Amendment right to a jury trial it may have. *Langenkamp v. Culp*, 498 U.S. 42, 44-45, 112 L. Ed. 2d 343, 111 S. Ct. 330 (1990) (per curiam). Yet, until AGCO files a proof of claim, it does not invoke such court's jurisdiction to resolve a dispute that may exist regarding its claim or claims so that it may share in the distribution of the bankruptcy estate. *In re Hooker Investments*, Inc., 937 F.2d 833, 835, 838 (2nd Cir. 1991). *Until AGCO submits a proof of claim and an objection to such is filed or an*

> *adversary proceeding is otherwise commenced, there is no pertinent contested matter in the bankruptcy court to be withdrawn. In re Chateaugay Corp.*, at 625-626; see also BR 7001, Advisory Committee Note (request for relief from automatic stay does not commence an adversary proceeding)." (Emphasis added.)

Similarly, it is well established that a personal injury claim initiated in the Bankruptcy Court by filing a proof of claim is nevertheless subject to mandatory withdrawal under 28 U.S.C. § 157 (b)(5) because jury trial rights are intended to be preserved in such proceedings whether or not they involve what is otherwise considered a "core proceeding." *See In re Patterson*, 150 B.R. 367 (E.D.Va. 1993); *In re Hansen*, 164 B.R. 482 (D.N.J. 1994).

II. APPLICATION OF 28 U.S.C § 157 TO DISCRIMINATION CASES RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION

Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353), in response to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held that the broad grant of jurisdiction to the newly formed bankruptcy courts created by the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), was invalid since they are not courts established under Article III of the Constitution. *See In re Vicars Ins. Agency*, 96 F.3d 949, 951 (7th Cir. 1996).

The 1984 Act included 28 U.S.C. § 157(d), which provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. *The district court shall*, on timely motion of a party, *so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration*

of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. (Emphasis added.)

The Second Circuit's Summary Order limits itself to Second Circuit decisions; no reference is made to any decisions of this Court or other appellate courts. It assumes that mandatory withdrawal of the reference to the Bankruptcy Court was not required under 28 U.S.C. § 157(d) on the basis that only a "simple reference" to the federal non-discrimination statutes was involved.

By the application of the jury trial mandate found in the Age Discrimination in Employment Act at 29 U.S.C. § 626 (c),[4] not to involve a "significant interpretation" of federal laws (A4), the Summary Order also ignores the constitutional dimensions of the issue, particularly in light of the requirements of the Seventh Amendment.

In addition, the plain language of 28 U.S.C. § 157(d), which does not use the phrase "significant interpretation," but only refers to "requires consideration" of other laws affecting interstate commerce along with bankruptcy laws as the condition required to trigger mandatory withdrawal. (A19-A20)

Relegated to the dustbin of insignificance by the Second Circuit's Summary Order is the unmentioned *Northern Pipeline* case, 458 U.S. 50 (1982), holding that such issues may be tried only in federal courts created under Article III of the Constitution, and not in Article I bankruptcy courts.

28 U.S.C. § 157(d) was enacted in 1984 for the purpose of protecting and preserving in Article III courts the jury trial rights of litigants such as petitioners herein. Evidence of such legislative intent is shown by the following statement of

---

[4] ". . . a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

Congressman Kastenmeier (130 Cong. Rec. H1850, daily ed., March 21, 1984):

> ["Activities affecting interstate commerce"] would, for example, mean related causes which may require consideration of both title 11 [of the Bankruptcy Code] and other Federal laws including cases involving the National Labor Relations Act, *civil rights laws . . . and similar laws.* (Emphasis added.)

Also, unmentioned as seemingly insignificant in the Second Circuit's Summary Order is *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 842 (1998), regarding the protections of the Older Workers Benefit Protection Act, 29 U.S.C. §§ 621, 626(f)(1), as a case that is applicable to releases of the kind obtained by Leslie Fay from petitioners Falbaum, Gill, Kishbaugh and Terwilliger having age discrimination claims when confronted with the pretext of "downsizing," and nevertheless considered by the Bankruptcy Court in deciding their claims notwithstanding the directly contrary provisions of 28 U.S.C. § 157(d). (140a-147a)

In addition, in the Bankruptcy Court petitioners also sought withdrawal under 28 U.S.C. § 157(b)(5) in connection with their Motion for Order Withdrawing Reference dated April 21, 1995, filed in the Bankruptcy Court (SSA 277-78), Reply Affidavit (J.A. 729-31) and Memorandum of Law dated May 30, 1995. (SSA 266-68)

Petitioners' Memorandum of Law dated April 21, 1995, cites *In re Boyer*, 93 B.R. 313, 317-18 (N.D.N.Y. 1988) at SSA 277-78, which holds that civil rights actions under 42 U.S.C. §§ 1983 and 1985 encompass personal injury tort claims that cannot be determined in the Bankruptcy Court. Their subsequent Memorandum of Law to the Bankruptcy Court dated May 30, 1995 includes an entire section under the heading: "WITHDRAWAL ALSO IS REQUIRED BECAUSE OF THE "PERSONAL INJURY" NATURE OF THE

CLAIMS." (SSA 266) Their brief to the District Court dated August 1, 1996, also includes a discussion of the same point at pp. 13-14. However, the District Court erred in concluding that the issue had not been raised by the petitioners, and the Summary Order of the Second Circuit ignored the issue.

III. DISQUALIFICATION AND DISGORGEMENT SHOULD HAVE MERITED INTENSIVE REVIEW

The compound conflicts of interests of the law firms that were involved in the proceedings in the Bankruptcy Court merited but did not receive intensive review in light of (a) the importance of such issues in the proper administration of justice, and (b) the conflict in the decisions below with those in other Circuits.

Bankruptcy Procedure Rule 2014(a) provides that professionals seeking employment as attorneys shall set forth all of the professional "connections" with the debtor, creditors, any other party in interest, the United States Trustee or any employee in the office of the United States Trustee.

Bankruptcy Rule 2014 permits no discretion on the part of the professional: all connections *must* be disclosed. Only complete disclosure at the time the professional seeks approval of employment affords the court the ability to determine whether the professional meets the test of disinterestedness. Thus, "[f]ailure to comply with the disclosure requirements of Rule 2014(a) is, by itself, enough to disqualify an attorney and deny compensation." *In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840, 847 (Bankr. S.D. Ill. 1993) (citing *Black Hills Greyhound Racing Ass'n*, 154 B.R. 285, 294 (Bankr. D.S.D. 1993); *In re Nat'l Distrib. Warehouse Co., Inc.*, 148 B.R. 558, 562 (Bankr. E.D. Ark. 1992); *In re Tinley Plaza Assocs., L.P.*, 142 B.R. 272, 278 (Bankr. N.D. Ill. 1992)).

Although the Bankruptcy Court declined to adopt the disqualification of the United States Trustee, in a decision dated December 15, 1994 (A 1295-1325), *In re Leslie Fay Cos., Inc.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994), Leslie Fay's counsel was not absolved of misconduct. (169a-179a)

On the contrary, the Bankruptcy Court specifically found that there had been substantial misconduct by Leslie Fay's counsel. The Bankruptcy Court found that Leslie Fay's counsel was not "disinterested" as required by 11 U.S.C. § 327(a). In addition, the Bankruptcy Court found that Leslie Fay's counsel had failed to file full and complete disclosure as required by Rule 2014 (J.A. 1312-1321). The omission of key information required to be disclosed both to the Bankruptcy Court and to the United States Trustee by Leslie Fay's counsel was found by the Bankruptcy Court to be "simply inexcusable." (187a)

What was found to be "simply inexcusable" the Bankruptcy Court paradoxically thereafter proceeded to excuse by authorizing payments of totaling over $13 million to them.

Moreover, at the time neither the United States Trustee nor the Bankruptcy Court could have been aware of the additional conflicting interests and non-disclosures affecting Leslie Fay's counsel that were to occur in their manipulation of the proceedings in the Bankruptcy Court in their malicious prosecution of the petitioners in the Adversary Proceeding initiated by Leslie Fay's attorneys in the Bankruptcy Court to punish and intimidate the petitioners, and other proceedings that Leslie Fay's attorneys insisted on being conducted in the Bankruptcy Court in order to obstruct petitioners' jury trial rights.

The manipulation of the affairs of a bankruptcy proceeding in the interests of corporate insiders has long been prohibited. *See Pepper v. Litton*, 308 U.S. 295, 312 (1939). Since that scenario is precisely what is shown by the time records of Leslie Fay's multiple counsel in the Bankruptcy Court, as

well as in the findings of the United States Trustee (J.A. 251-274), the effect has been to have irreparably tainted the determinations below. For that reason, they should be reversed and vacated in accordance with *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990).

Complete disclosure by attorneys is essential for the bankruptcy court to make a considered, reasoned determination on applications for employment. Thus, any fact which might have bearing on the question of the attorney's disinterestedness or the attorney's representation of an adverse interest must be disclosed. *See In re Rusty Jones, Inc.*, 134 B.R. 321, 345 (Bankr. N.D. Ill. 1991); *see also In re Granite Partners, L.P.*, 219 B.R. 22 (Bankr. S.D.N.Y. 1998).

The issue of attorneys' non-disclosure of conflicts in applications for employment was addressed in *In re H. L. Stratton, Inc.*, 51 F.2d 984 (2d Cir. 1931), *cert. denied*, 284 U.S. 682 (1932), which upheld a decision which denied fees and ordered repayment of fees previously paid.

In re Arlan's Dep't Stores Inc., 615 F.2d 925 (2d Cir. 1979), fees to two law firms were denied and the return of fees and disbursements were ordered returned along with interest on the amounts previously paid, because of the attorneys' failure to disclose one firm's fee-sharing arrangement with the non-bankruptcy general counsel for the debtor and payments of fees to both firms without court authorization. *See also In re Futuronics*, 655 F.2d 463, 468-69 (2d Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) ("It has long been the practice in this Circuit to deny compensation to counsel who fail to comply with the disclosure provision").

Bankruptcy Rule 2014(a) leaves an attorney seeking employment with no discretion to choose what connections are relevant or trivial to a Section 327(a) analysis. *See In re Rusty Jones*, 134 B.R. 321 at 345 (Bankr. N.D.Ill. 1991) ("the decision about what to disclose is not left to the prospective attorney whose judgment may be clouded . . . there is no

merit to the [law firm's] argument that it did not have to disclose its connections . . . because its attorneys did not feel that a conflict existed.").

Bankruptcy Code Section 327 requires that a professional be disinterested. The bankruptcy court in *In re Crivello*, 194 B.R. 463 (Bankr. E.D. Wis. 1996) construed the Bankruptcy Code's definition of "disinterested person" under section 101(14) as being "expansive enough to encompass anyone who may have an interest in or relationships with the debtor, tending to color the objective and impartial perspective required of attorneys." *Crivello*, 194 B.R. at 465 (citations omitted). "[A] 'disinterested person should be divested of any scintilla of personal interest which might be reflected in his decision concerning estate matters.' " *Id.* (quoting *In re Martin* 817 F.2d 175, 181 (1st Cir. 1987). The repeated assertions that the representation of the individual senior officers and directors of Leslie Fay by its counsel as persons subject to individual liability in other proceedings directly related to the litigation of petitioners' claims did not conflict with their representation of Leslie Fay as a corporate entity raise very important issues that need to be reviewed to insure the integrity of proceedings conducted in the Bankruptcy Courts.

The quarterback calling the plays involved in the conflict-impacted proceedings in the Bankruptcy Court was the law firm that acted as lead counsel for Leslie Fay, Weil, Gotshal, & Manges. That law firm's violation of the requirements of Bankruptcy Rule 2014 and related provisions from the beginning and throughout the Chapter 11 proceeding are well established, as the United States Trustee found in making a motion for the firm's disqualification (J.A. Mem.L. 10/19/94, p.10):

> "As the Debtors' counsel, Weil Gotshal was required to maximize the estates in order to provide the greatest recovery for creditors' claims. As the attorney for the Audit Committee, Weil Gotshal investigated the Debtors' officers and directors, including Mr. Tarnopol and Mr.

> Friedman. Weil Gotshal's representation of Bear Sterns [sic] and Odyssey—while concurrently investigating Mr. Tarnopol and Mr. Friedman—caused it to have an interest adverse to the estates which rendered it not disinterested under section 101(14)(E).

"Given the stature of Messrs. Friedman and Tarnopol within the corporate structure of Weil Gotshal's clients, Weil Gotshal's ties to Baer Stearns and Odyssey created, on the date the firm was retained, the appearance of an incentive not to pursue potential claims against those directors with the utmost vigor. As a result of these divided loyalties, Weil Gotshal was not disinterested when it sought to be retained as the Debtors' counsel."

The fruit of the poison tree in the circumstances of this proceeding, however, also turned out to be evident, as shown by the conflicts of interest not only of WG&M but also of the other law firms which that firm picked to represent the Leslie Fay, including MW&E and PCF&K whose real interests at all times were primarily subservient to the individuals who were the principals in the management and control of Leslie Fay. The fees received by these law firms therefore should be disgorged. Since these firms were not properly retained and, in addition, were affected by their conflicting interests in the manner in which they performed their services, they cannot be compensated for their improper, conflict-impacted representation of Leslie Fay. *See In re Federated Dep't. Stores, Inc.*, 44 F.3d 1310, 1319-20 (6th Cir. 1995) (holding that a valid appointment under § 327 is a condition precedent to receiving compensation under § 330; where a professional is later found not to have been disinterested at the time of appointment, there cannot have been a valid appointment under § 327 and compensation must be denied); *In re Grabill Corp.*, 983 F.2d 773, 777 (7th Cir. 1993) ("The scattered cases . . . that allow a lawyer to be compensated who, lacking the requisite disinterest, could not have been appointed seem to us just plain

wrong."); *see also In re Envirodyne Inds. Inc.*, 150 B.R. 1008, 1021 (Bankr. N.D. Ill. 1993) ("Failure to abide by the disclosure requirements is enough to disqualify a professional and deny compensation, regardless of whether the undisclosed connections were material or *de minimis*.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
19 West 44th Street, Suite 412
New York, New York 10036
(212) 730-0044

Counsel for Petitioners Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud, and Raymond J. Terwilliger

ADDENDUM

Constitutional and Statutory Provisions Involved

United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *"

United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 46. Assignment of judges; panels; hearings; quorum

> (a) Circuit judges shall sit on the court and its panels in such order and at such times as the courts directs.
>
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentences of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judges of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judges was in regular active service.

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*:

29 U.S.C. § 621. Congressional statement of findings and purpose:

"(a) The Congress hereby finds and declares that—

(1) in the fact of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill,

morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of foods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 626 (b):

"The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this sec-

tion, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

29 U.S.C. § 626(c)(1):

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter."

29 U.S.C. § 626(c)(2):

"In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the indi-

vidual notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(e):

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

Older Workers Benefit Protection Act ("OWBPA"):
29 U.S.C. § 626(f):

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of any employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 633a(c):

Any persons aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.*:

42 U.S.C. § 2000e-5(f)(3):

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-5(g):

> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with rea-

sonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates the respondent would have taken the same action in the absence of the impermissible moving factor, the court—

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 12101(b)(4):

(b) Purpose

It is the purpose of this chapter—

> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

address the major areas of discrimination faced day-to-day by people with disabilities.

11 U.S.C. § 1107(a). Rights, powers, and duties of debtor in possession:

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 328. Limitation on compensation of professional persons:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.
>
> (b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney

or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 327. Employment of professional persons:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

Bankruptcy Rule of Procedure 2014(a):

Employment of Professional Persons:

(a) *Application for and Order of Employment.* An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts

> showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Bankruptcy Rule of Procedure 2016:

Compensation for Services Rendered and Reimbursement of Expenses:

> (a) *Application for Compensation or Reimbursement.* An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation

received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) *Disclosure of Compensation Paid or Promised to an Attorney for Debtor.* Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery:

A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, renumeration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a

case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provision of title 11; knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor;

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 155. Fee agreements in cases under title 11 and receiverships:

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of

the estate, shall be fined under this title or imprisoned not more than one year, or both.

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from the property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmation of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and

other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 158. Appeals:

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial council of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is

appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeal from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.